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IN THE

Supreme Court of the United States

EMIL NOTTI, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

FRED W. TRIEM
Counsel of Record
Box 129
Petersburg, Alaska
99833-0129
(907) 772-3911
triemlaw@alaska.net

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QUESTIONS PRESENTED

Should this Court resolve the issues it left open in *Merrell Dow:*

1. Can the adoption of federal law by a state statute give rise to § 1331 federal question jurisdiction when the federal law does not occupy the field, does not entirely displace state law, does not create a federal cause of action, and does not contain a federal remedy?

2. Should this Court adopt a bright line rule requiring the existence of a private cause of action and remedy under federal law before it will allow § 1331 jurisdiction?

3. Should this Court adopt a bright line rule that a federal law that provides no private remedy cannot supply a "jurisdiction-triggering federal question"† and thus cannot give rise to § 1331 jurisdiction?

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† *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804, 817 & n.15 (1986).

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PETITIONERS' REPLY BRIEF

CIRI's response overlooks two important principles: *First*, the incorporation of federal law by state law does not allow a state law claim to be removed to federal court unless the federal law creates a federal cause of action and also provides a federal remedy. CIRI's statute, ANCSA § 7(r) does neither. *Second*, the assertion of federal law as a defense to a state law claim, as here in this case, does not provide a legitimate basis for removal to federal court. CIRI's defense is that its federal statute preempts state corporate law. Even if its federal preemption defense were correct, CIRI cannot use it to supply removal jurisdiction in a federal court.

The petitioning shareholders (Notti, et al.) sued their corporation (CIRI) in state court because CIRI is violating bed-rock principles of corporate law in a area of law, corporate governance, that traditionally is left to the states. There is no federal law of corporations.

No part of the shareholders' state law complaint asserts any claim under federal law, only state law causes of action. The complaint is barren of any federal claim.

CIRI removed to federal court on the ground that a federal law, ANCSA § 7(r), codified at 43 U.S.C. § 1606(r), preempts state corporate law and thus authorizes CIRI to pay dividends in violation of state law. The federal issue has come in by way of CIRI's *defense*, not from the shareholders' complaint, which makes only state law claims. CIRI removed on the basis of a federal defense: the corporation argues that federal law allows its discrimination[1] and thus CIRI relies upon a defense of federal law, ANCSA § 7(r).

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[1] A doubtful proposition because (a) the statute allows discrimination only against non-Natives but *not* among Natives themselves (the petitioning shareholders are all Alaska Natives) and (b) the statute authorizes charitable or eleemosynary "benefits" but does not authorize payment of corporate distributions or *dividends* on a basis other than pro rata (i.e., per share). ANCSA § 7(r) merely allows a Native corporation to conduct its charitable works without having to do so on a per share basis. But it says nothing about paying hard core dividends on a discriminatory basis, a notion that always has been forbidden and still is. The opinion of Sen. Murkowski is irrelevant because he was not elected to Congress until circa 1981, and therefore he is not qualified to speak with legislative authority on the purpose of ANCSA, which was adopted by Congress in 1971.

I. The "Substantial Federal Question" Test is Too Broad, Too Vague, and Too Subjective to Define Federal Removal Jurisdiction Correctly.

The Ninth Circuit has adopted a wide-reaching jurisdictional test that can be stretched or molded to fit any set of circumstances for which a lower court might wish to justify its assertion of federal jurisdiction:

> The district court had subject matter jurisdiction because the complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders.

Notti v. C.I.R.I., 31 Fed.Appx. 586 (9th Cir. 2002). Petition for Certiorari, Appendix D at 28a (underlining added).

CIRI's attempt to restate the question presented illustrates the misunderstanding that has resulted from *Merrell Dow*: A test of "sufficiently 'substantial'" is too broad, too vague, and too subjective to define the federal removal jurisdiction.

Some federal courts that have decided shareholder claims in cases analogous to this one have recognized that the "substantial federal question" test is way too broad. A recent example is *Donovan v. Rothman*, 106 F.Supp.2d 513, 516 (S.D.N.Y. 2000) (action by shareholders against corporation; after removal by corporate defendant, remanded because plaintiffs' allegations of breach of fiduciary duty by violating federal Medicare statute did not present substantial federal question: "the absence of a private right of action in the statute 'counsels against a finding of federal question jurisdiction' and it significance 'cannot be overstated,'" citing

Barbara v. New York Stock Exchange, Inc., 99 F.3d 49, 53-54 (2nd Cir. 1996) and *Merrell Dow*[2]).

A well-regarded Seventh Circuit decision, also a shareholder suit for breach of fiduciary duty, has noted the importance of the federal cause of action and the federal remedy. *Seinfeld v. Austen,* 39 F.3d 761, 764 & n.2 (7th Cir. 1994) (action by shareholders against corporate directors; federal issue raised by complaint did not provide for a private remedy under a federal cause of action; state law action based upon violation of federal claim does not raise substantial federal question unless there is a federal right of action to enforce federal claim; and collecting cases).

CIRI's reliance in its opposition upon *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997), cert. denied, 524 U.S. 926, 141 L.Ed.2d 694, 118 S.Ct. 2319 (1997), is not sound.

Federal jurisdiction in *Cabazon* arises from IGRA, Indian Gaming Reform Act, a federal statutory scheme that *does* create a federal cause of action and that *does* contain a federal enforcement mechanism (i.e., a federal remedy). *See* 25 U.S.C. § 2713 (civil penalties); § 2714-15 (jurisdiction in federal courts). Furthermore, *Cabazon* presents an alternative ground for federal jurisdiction, 28 U.S.C. § 1362 ("brought by any Indian tribe or band"). CIRI is not such an entity, and its lands are not Indian country. That Indian country does not exist in Alaska was settled in *Alaska v. Native Village of Venetie*, 522 U.S. 520, 534, 140 L.Ed.2d 30, 40, 118 S.Ct. 948 (1998).

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2 "The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated." 478 U.S. at 812

II. When a State Law Claim is Removed to a Federal Court, the Proper Jurisdictional Test Is Whether the Federal Law at Issue Creates a Cause of Action and also Provides a Federal Remedy — ANCSA § 7(r), the Law in this Case, Does Neither.

Some lower federal courts have correctly perceived the flaw in the *Merrell Dow* formula and have divined the importance of an independent federal cause of action and a federal remedy. But not all of the lower courts — hence the split among the circuits.

An example of the correct rule is seen in a very recent decision of the Seventh Circuit that was issued only two months ago: *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788-89 (7th Cir. 2002) (unless the federal law creates a federal remedy, the federal issue will arise only as a defense and thus will not give rise to federal question jurisdiction; collecting cases).

This Court has said that some federal statutes, although intruding into areas of traditional state law, have significance as a rule of decision even though not providing a federal cause of action. *E.g., Thompson v. Thompson,* 484 U.S. 174, 98 L.Ed.2d 512, 108 S.Ct. 513 (1988) (PKPA does not provide an implied cause of action in federal court because Congress intended only that the Act should furnish a rule of decision but not to create a new cause of action).

The following table illustrates the range of views:

Incorporation of Federal Law in State Law Causes of Action — Many of the Circuits Require a Federal Cause of Action, But Others Do Not Use This Analysis:

Case	***Private Right of Action Required?***	***Federal Statute***
Rogers v. Platt [3]	No	PKPA
West 14th St. v. 5 West 14th [4]	Yes	CCARA
Aaron v. National Union [5]	Yes	LHWCA
Seinfeld v. Austen [6]	Yes!	Clayton Act
Cabazon Band v. Wilson [7]	No, *but see* dissent	IGRA
Husmann v. T.W.A. [8]	No, *but see* dissent	Warsaw Cnv
Hart v. Bayer Corp. [9]	Yes	FIFRA

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[3] *Rogers v. Platt,* 814 F.2d 683 (D.C.Cir. 1987) (no, but discussing the possibility of requiring a federal cause of action).

[4] *West 14th St. Comm. Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 193-94 (2nd Cir. 1987).

[5] *Aaron v. National Union Fire Ins. Co. of Pittsburg,* 876 F.2d 1157, 1164 (5th Cir. 1989).

[6] *Seinfeld v. Austen,* 39 F.3d 761, 764 & n.2 (7th Cir. 1994) (collecting cases).

[7] *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1056 (9th Cir. 1997), *cert. denied,* 524 U.S. 926, 141 L.Ed.2d 694, 118 S.Ct. 2319 (1997), *but see* the dissent at 1062-63.

[8] *Husmann v. T.W.A.,* 169 F.3d 1151 (8th Cir. 1999), *but see* the dissent at 1154-55.

[9] *Hart v. Bayer Corp.,* 199 F.3d 239, 245-46 (5th Cir. 2000).

Johnson v. Baylor Univ. [10]	Yes	PRSA
Penobscot Nation v. Ga.Pac[11]	Yes	CWA, etc.
Southwest Air Ambulance Inc. v. City of Las Cruces [12]	Yes	AHTA
Notti v. CIRI [13]	No	ANCSA
Anderson v. H &R. Block [14]	Yes, *but see* dissent	NBA
Breuer v. Jim's Concrete [15]	No	FLSA
Valdivieso v. Atlas Air, Inc.[16]	No	FLSA
Rogers v. Tyson Foods, Inc.[17]	Yes!	PPIA
Donovan v. Rothman [18]	Yes	SSA

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[10] *Johnson v. Baylor Univ.*, 214 F.3d 630, 633 (5th Cir. 2000).

[11] *Penobscot Nation v. Georgia Pacific Corp.*, 254 F.3d 317, 321 (1st Cir. 2001).

[12] *Southwest Air Ambulance Inc. v. City of Las Cruces*, 268 F.3d 1162, 1169 (10th Cir. 2001).

[13] *Notti v. C.I.R.I.*, 31 Fed.Appx. 586 (9th Cir. 2002).

[14] *Anderson v. H &R. Block, Inc.*, 287 F.3d 1038, 1043 (11th Cir. 2002), *certiorari petn. pending*, Case Nos. 02-306 and 02-312.

[15] *Breuer v. Jim's Concrete of Brevard,*[15] 292 F.3d 1308 (11th Cir. 2002), *petition for cert. pending*, Case No. 02-337.

[16] *Valdivieso v. Atlas Air, Inc.,*[16] 305 F.3d 1283 (11th Cir. 2002) *petition for cert. pending*, Case No. 02-728.

[17] *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788-89 (7th Cir. 2002) (collecting cases).

[18] *Donovan v. Rothman*, 106 F.Supp.2d 513, 516-17 (S.D.N.Y.2000).

III. The Proposed Rule Would Resolve the Debate in the Lower Courts and Would Answer the Question About Which Circuits Are Split — When May a State Law Claim be Removed to a Federal Court?

The shareholders propose a bright line rule that would end the confusion and debate about federal removal jurisdiction. Supra at i. CIRI mistakenly argues that the requirement of a federal cause of action (which has its source in the *Smith* case) applies only when the state-law plaintiffs claim a *violation* of federal law. CIRI's Opposition at pgs. 10 - 13. The commentators do not agree. Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX.L.REV. 1781, 1786-93 (1998); DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL, 68 - 75 (4th ed. 1999); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, 97 - 105 (2nd ed. 1990); *see generally,* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 5.2 et seq. (3rd ed. 1999).

Although some cases do speak of a "violation," this is not an absolute requirement. If it were so, CIRI's theory would federalize vast areas of state law. For example, Alaska adoptions could be removed to federal court because state law incorporates ICWA, 25 U.S.C.

IV. The Issue in this Case is not Unique. Whether State Law Incorporation of Federal Law Creates Federal Removal Jurisdiction is a Topic about which the Lower Courts Are Reaching Differing Conclusions.

Examples can be found in the table at pages 6-7 above, in the Petition and in the Supplemental Brief. See also, CIRI's Brief in Opposition at pgs. 15 -18.

V. Although CIRI's Statute is Narrowly Focused, the Issue of Federal Question Jurisdiction Over State Law Claims is of Nation-Wide Importance.

This case is a proper vehicle to resolve the issue. The facts are uncomplicated and undisputed. It is irrelevant that the statute applies only to Alaska Native corporations. What matters is the universal importance of the jurisdictional issue.

The petitioning shareholders admit that state law does incorporate federal law by reference. Indeed, AS 10.06.960(f)[19] adopts federal law as a rule of decision in Alaska courts, at least where federal law conflicts with state law. This state law is merely an expression of the preemption principle: if state law conflicts with a federal statute (i.e., ANCSA), then federal law controls.

The federal law that is presented here, ANCSA § 7(r), has meaningful application only in Alaska. However, the question of removal jurisdiction presented in this case has importance throughout the Nation. The Alaska Corporations Code is only one of many state laws that incorporate federal law by reference.

Whether incorporation converts a state law claim into a federal claim is the central issue presented in this case? The shareholders argue that mere incorporation is not sufficient. More is required: the federal law at issue must create a federal cause of action, must contain a federal remedy, must displace the state law that otherwise would control, and contain a jurisdictional grant or an expression of Congressional intent that claims made pursuant to the law can be litigated in a federal court.

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[19] Text set out in the Appendix to the Petition at 35a.

CONCLUSION: Forming the Correct Boundary Between State and Federal Judicial Power is an Issue of Substantial Importance; this Case is an Ideal Vehicle to Create a Definitive Jurisdictional Rule.

Alaska law created CIRI's obligations to its shareholders: i.e., to treat them equally, to pay its dividends without discrimination, to use a current record date when making distributions, and to avoid giving special preferences to the directors that are not paid to all shareholders of the same class of stock.[20] No part of the shareholders state law complaint relied upon federal law. Instead, the federal law issue was injected by CIRI's *defense*.

The Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to remand to State court. In the alternative, this Court should summarily reverse the decision of the Court of Appeals. In the second alternative, this petition should be held over to await the decision of this Court in other pending cases that present similar issues about the jurisdiction of the federal courts in removal cases.[21]

Respectfully submitted on 27 December 2002.

FRED W. TRIEM
Petersburg, Alaska
Attorney for Petitioners

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[20] Alaska Statutes, AS 10.06.305(b), -.313, -.408, -478, -.542. *See* Cert Petn., Appendix, at 31a – 34a.

[21] E.g., *Anderson v. H&R Block, et al.*, Case Nos. 02-306, 02-312; *Breuer v. Jim's Concrete of Brevard,* Case No. 02-337; *Valdivieso v. Atlas Air, Inc.*, Case No. 02-728.